No. 98-97 (21)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, Director, California Department of Social Services, *et al.*,

Petitioners,

—v.—

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR WILLIAM COHEN, MICHAEL C. DORF, GERALD GUNTHER, RODERICK M. HILLS, JR., PAUL KAHN, KENNETH L. KARST, SETH KREIMER, DOUGLAS LAYCOCK, JEFFERY LEHMAN, FRANK MICHELMAN, RICHARD PILDES, DONALD H. REGAN, STEVEN SHRIFFRIN, GARY SWIMSON, AND CHRISTINA B.WHITMAN, *AMICI CURIAE, SUPPORTING RESPONDENTS*

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QUESTION PRESENTED

Whether California's statute requiring bona fide state residents who have resided less than one year in California to receive only the welfare benefits that they would have received in their former state of residence violates Article IV, section 2's Privileges and Immunities Clause or the Fourteenth Amendment.

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are law professors, identified in an addendum below, who, with the consent of the parties, hope to address more directly than the parties the ingredients of our complex federal structure that we believe are significantly implicated by state laws imposing length of residence restrictions. From our perspective this case is primarily about intrastate equality irrespective of one's former non-residency in the state, which is implicit in the structure of national and state citizenship and reflected textually in the Privileges and Immunities Clause of Article IV, section 2 and the Citizenship Clause of the Fourteenth Amendment. That is a perspective we hope the Court will find informative.

SUMMARY OF ARGUMENT

The Constitution attempts a remarkable feat: it creates a national citizenry with nationally recognized rights while simultaneously respecting the principle of federalism. To reconcile these two goals, the Constitution relies on a simple but powerful principle — the principle that, while states have broad discretion to choose their policies, states may not choose their citizens. Instead, every state must allow all national citizens to settle within the state on equal terms with existing residents. This principle is embodied not only in the Privileges and Immunities Clause of Article IV, section 2 and also the Citizenship Clause of the Fourteenth Amendment, but also in the structure of our federalism: the principle of equal treatment of new and old residents insures that national citizens can take advantage of the liberty-protecting characteristic of federalism — the opportunity to flee oppressive states and migrate to states with more congenial laws.

This Court has consistently enforced a strong presumption against classifications that burden new residents

based on length of residency, because such discrimination violates the principle that national citizens may establish a home within any state free from discrimination in favor of existing residents. In particular, this Court has allowed durational residency requirements only when there is a genuine danger that transient migrants will enter the state with the purpose of grabbing a "portable" good provided by the state (*e.g.*, a divorce decree or university diploma) and then immediately leave the state with the benefit in hand.

California's residency requirement for welfare benefits strikes at the heart of these principles. There is no reason to believe that welfare recipients lack a genuine intent to reside indefinitely in California. Moreover, this discrimination against bona fide residents of the state cannot be justified by a governmental interest in avoiding a "race to the bottom" in welfare benefits, not only because such a defense is foreclosed by this Court's precedents, but also because such a justification, if accepted by this Court, would open the door to a vast array of classifications designed to discourage the immigration of indigent citizens. California's residency requirement also cannot be justified by Congress' authorization in 42 U.S.C. § 604(c), because Congress lacks the power to burden the individual rights of citizens to settle in a new state on equal terms with old residents.

ARGUMENT

I. THE CONSTITUTIONAL REQUIREMENTS OF INTRASTATE AND INTERSTATE EQUALITY OF NATIONAL CITIZENS PRESUMPTIVELY FORBID STATE LAWS THAT CLASSIFY BONA FIDE RESIDENTS BY LENGTH OF RESIDENCY.

As its framers recognized, one central purpose of the United States Constitution is that it attempts to reconcile the two potentially contradictory goals of national union and federalism.

See THE FEDERALIST No. 39, at 246 (James Madison) (Clinton Rossiter ed. 1961) ("The proposed Constitution is ... neither a national nor a federal Constitution but a composition of both"). The Constitution creates "a more perfect union" by establishing a national citizenry protected by national rights. At the same time, the Constitution also creates a federal regime in which the people of each state governments have substantial autonomy to govern themselves. The fundamental challenge facing any court attempting to construe this Constitution, therefore, is to preserve national union and federalism simultaneously so that the United States remains "an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

The concept of equal state citizenship, irrespective of the former geographic residence of the citizen, is one of the Constitution's central mechanisms — perhaps *the* central mechanism — for reconciling national citizenship with federalism. According to this fundamental concept, state governments enjoy broad discretion to choose how they wish to govern their citizens. They are, however, required to respect the right of each citizen of the United States "to become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 80 (1873). As Justice O'Connor has noted, no state can "force[ ] non-residents settling in the State to accept a status inferior to that of oldtimers." *Zobel v. Williams*, 457 U.S. 55, 74 (1982). *Zobel*, at 74 (O'Connor, J., concurring). States have broad discretion to choose their tax and regulatory policies but no discretion to choose their members.

Although this Court has emphasized the 14th Amendment as the textual source of this presumption against discrimination based on former geographic residence, the presumption has its earliest embodiment in other textual provisions or constitutional doctrines, including the privileges

and immunities clause of Article IV, section 2[1]. In particular, as Justice Story noted, the Privileges and Immunities Clause of Article IV, section 2 "confer[red] on [each state citizen] a general citizenship."[2] From the outset, as reflected in Justice Bushrod Washington's opinion in *Corfield v. Coryell*, it was understood that one of the incidents of such citizenship was "[t]he right of a citizen of one state to pass through, *or reside in* any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[3] In other words, Article IV did not merely protect the sojourner's right to journey through a state but also the right of a newly arrived citizen to establish their residence in a state on a basis of equality.[4]

But the antebellum experience of the United States suggested that Article IV's Privileges and Immunities Clause was not sufficient to prevent state discrimination against newly arrived citizens. Prior to the Civil War, Southern states were notorious for their interference with interstate migration, excluding free Black citizens and abolitionists from their territory

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[1] *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *United States v. Wheeler*, 254 U.S. 281 (1920); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (Case No. 3,230) (Washington, J.).

[2] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 3:1800 (1833).

[3] *Corfield*, 6 Fed. Cas. at 551 (emphasis added).

[4] *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451, 501 (1992); Jonathan D. Varat, *Economic Integration and Interregional Migration in the United States Federal System*, in Comparative Constitutional Federalism: Europe and America 31 (Greenwood Press 1990).

even when it was well-understood that such exclusion interfered with the comity owed to Northern states under Article IV, section 2, or the dormant commerce power of Congress under Article I, section 8.[5] It was widely acknowledged that these exclusions would be unconstitutional if free Blacks were "citizens of each State" within the meaning of Article IV, section 2. Chief Justice Taney rejected the possibility of state citizenship for free Blacks under Article IV, section 2 in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), precisely because he assumed that state citizenship "would give [free Blacks] the right to enter every other State whenever they pleased," a conclusion that he found unacceptable. *Id.* at 417.

The citizenship clause of the Fourteenth Amendment was intended by the framers to overrule *Dred Scott*. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting). More fundamentally, the framers' experience of the Slave Power's attacks on national citizenship and free interstate migration convinced the framers that states ought to be barred from selecting who could qualify for state citizenship: a central purpose of section 1 of the Fourteenth Amendment was to

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[5] For instance, southern states imprisoned free Black seamen who entered Southern ports with their ships, even in the teeth of Justice Johnson's decision in *Elkison v. Deliesseline*, 8 Fed. Cas. 493 (C.C.D.S.C. 1823) striking down such restrictions on free movement of both free Black Northern citizens and foreign seamen as encroachments of Congress' power to regulate international commerce. For an account of the Negro Seamen's Acts, see Paul Finkelman, *States' Rights North and South in Antebellum America*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 130-33 (Kermit Hall & James W. Ely, Jr. eds., 1989). For an account of Southern state courts' rejection of free Blacks' claims to freedom under Northern liberty laws, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY ch. 7 (Chapel Hill, N.C., 1981).

prevent discrimination based on a citizen's state of origin.[6] The Citizenship Clauses, therefore, served as "a new constitutional confirmation" of the Privileges and Immunities Clause of Article IV, section 2,[7] guaranteeing to all national citizens (in Senator

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[6] Representative John Bingham, for instance, argued that the Constitution had failed to secure equal protection of the laws for "white men as well as black men," noting that, before the Civil War, "it was entirely unsafe for a citizen of Massachusetts ... to be found anywhere on the streets of Charleston...." Bingham was referring to the notorious incident in which Samuel Hoar, a Massachusetts abolitionist, was driven out of Charleston by a mob with the connivance of the state government when he attempted to speak against the state's Negro Seamen Act. According to Bingham, the concept of equal protection was intended to prevent such discrimination based on state citizenship. *See* EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 53-54 (1990). This view was echoed by Senator Lyman Trumbull and Representative James F. Wilson, both of whom were central figures in the passage of the Fourteenth Amendment. *See* MALTZ, *supra* at 64-65.

[7] JACOBUS TENBROEK, EQUAL UNDER LAW 232 (1965) ("The comity clause ... was the particular provision of the existing Constitution, most speakers agreed, the systematic violation of which had made necessary a new constitutional confirmation"). Representative Jacob Howard's views on this question are particularly instructive, as he was the official spokesman for the Joint Committee on Reconstruction on the meaning of the Fourteenth Amendment. According to Howard, the great object of the Fourteenth Amendment was to insure that the states respected the principles of comity contained in Article IV, section 2 not only for citizens of other states but also citizens of their own state. See MALTZ, supra at 97-98. To define the privileges and immunities protected by the Fourteenth Amendment, Howard referred to Justice

(continued...)

Lyman Trumbull's words) the right "to go into any State of the Union and to reside there."[8] The Court in *Slaughterhouse*, therefore, was on solid historical ground when it asserted that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that state." 83 U.S. (16 Wall.) 36, 80 (1873).

In short, both the Fourteenth Amendment's Citizenship Clause and Article IV, section 2 were historically understood to protect national citizens' rights to migrate freely throughout the United States on terms of equality with other state citizens. Moreover, these textual and historical foundations for the right to equal state citizenship are rooted in the structural imperative to reconcile national citizenship with federalism. It is easy to see why such a presumption against geographic-based discrimination fosters national union.[9] But the ingenuity of the principle against geographic-based discrimination is that it protects national unity while simultaneously advancing the liberty-promoting values of

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[7](...continued)
Bushrod Washington's recital of rights in *Corfield v. Coryell.* MALTZ, supra at 109. As noted above, *Corfield*'s catalogue of rights included the right to establish a residence within a new state.

[8] Lyman Trumbull's remarks are reported at Cong. Globe, 39th Cong., 1st Sess. 1757 (1866). The Republican consensus on Article IV, section 2 is discussed in EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 at 55, 63-65, 97 (1990).

[9] As this Court has noted, "without some provision . . . removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

federalism. This Court has noted that an important benefit of a "federalist structure of joint sovereigns" is to "make[] government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). For such competition to exist, each citizen must have "the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes." *Zobel*, 457 U.S. 55, 76-77 (1982) (O'Connor, J., concurring in judgment).

The United States has a venerable tradition of protecting liberty through mobility: a wide variety of groups — religious dissidents, fugitive slaves, the freed men who fled then post-Reconstruction South,[10] and the indigent — have migrated within the United States to escape oppressive laws or living conditions,

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[10] Between 1877-1880, for instance, thousands of African-American known as the "Exodusters" responded to circulars and public meetings calling for an exodus to Kansas to escape from the racist terrorism and poverty of the South after Reconstruction ended. Southern whites, fearing the loss of cheap labor, often tried to halt the migration with violence. *See* NELL IRVINE PAINTER, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION (Norton, 1976). Throughout the post-Civil War 19th Century, African-Americans also migrated across state lines within the South to seek out better-paying jobs, assisted by immigration agents who located employers in other states and arranged railroad transportation. Again, state governments attempted to stop such migration by imposing prohibitively high licensing fees on such agents. *See* David Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781, 792-801 (1998).

often in the teeth of state resistance to such migration.[11] But this system of federalism presupposes that states cannot shut the doors to immigrants fleeing from impoverished or oppressive states. The presumption against durational residency requirements, therefore, limits state discretion but actually promotes the values of federalism that justify such discretion.

A. EVEN WITHOUT THE FOURTEENTH AMENDMENT, ARTICLE IV, SECTION 2'S PRIVILEGES AND IMMUNITIES CLAUSE PRESUMPTIVELY BARS STATES FROM DISCRIMINATING AGAINST BONA FIDE RESIDENTS WITH DURATIONAL RESIDENCY REQUIREMENTS.

Justice O'Connor has most recently explained why Article IV, section 2 bars discrimination against bona fide state residents based on the time of their immigration to the state. As Justice O'Connor notes, if Article IV, section 2 would bar a state from discriminating against non-residents who enter a state to work, hunt, or obtain medical services, then "[a] fortiori, the Privileges and Immunities Clause should protect the 'citizen of State A who ventures into State B' to settle there and establish a home." *Zobel*, 457 U.S. at 74 (O'Connor, J., concurring) (citations omitted). The privileges and immunities clause of Article IV, section 2, in short, provides that newcomers to a state cannot be treated differently *after* they establish residency within the state because of their prior status as a non-residents.

To be sure, the clause does not "profess to control the power of the State governments over the rights of its own citizens." *Zobel*, 457 U.S. 84, n. 3 (Rehnquist, J., dissenting) (quoting *Slaughter-House Cases*, 16 Wall. 36, 77 (1873)). But

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[11] *See* Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1503 (1987) ("The main reason oppression at the federal level is more dangerous is that it is more difficult to escape").

Justice O'Connor rightly notes that Article IV's Privileges and Immunities Clause has force against durational residency requirements that are applied against a state's own residents, because such state laws burden persons based on their past status as a non-resident of the state: in Justice O'Connor's words, such classifications burden newcomers because of their "former residential status." *See Zobel*, 457 U.S. at 75. For instance, the Alaskan law at issue in *Zobel* burdened the Zobels because they had remained in another state prior to 1959 instead of immigrating to Alaska. Such classifications burdening persons because of their former non-residential status are presumptively impermissible under Article IV, section 2, because Article IV's Privileges and Immunities Clause makes "noncitizenship or nonresidence an improper basis for locating a special burden." *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975).

In sum, once one has established bona fide residency, one cannot be relegated to an inferior status because one did not arrive in the new state, or leave one's old state, soon enough to qualify as an especially privileged oldtimer.[12] Otherwise, any state government could easily evade the prohibition contained in Article IV's Privileges and Immunities Clause simply by delaying the imposition of discriminatory burdens against newly arrived non-residents until they had lived in the state long enough to establish bona fide residency.

B. THE FOURTEENTH AMENDMENT PRESUMPTIVELY PROHIBITS DISCRIMINATION AGAINST BONA FIDE RESIDENTS BASED ON LENGTH OF RESIDENCE.

If additional warrant is required to establish a presumption against state rules discriminating against bona fide residents based on the recency of their arrival in the state, then the Fourteenth Amendment provides such warrant. Three clauses

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[12] *See* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 518-19 (1981).

of the 14th Amendment in particular impose on states a duty of impartiality toward recent immigrants who have become new state citizens. First, the earliest Fourteenth Amendment decisions of this Court recognize that the Fourteenth Amendment's privileges and immunities clause guarantees that "a citizen of the United States can, by his own volition, become a citizen of any State of the Union by a bona fide residence therein, *with the same rights as other citizens of that State*." *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 80 (1873) (emphasis added). The *Slaughterhouse* majority, in other words, recognized that the individual's right to settle within any state of the Union presupposed intrastate equality between newly arrived state citizens and the "other citizens of the state."

Second, this understanding of the Fourteenth Amendment is reenforced by the Fourteenth Amendment's Citizenship clause, which guarantees that national citizens are entitled to state citizenship in the state "wherein they reside." *See Zobel*, 457 U.S. at 69-70 (Brennan, J., concurring) ("[T]he citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence"). It follows that states may not "concede [new residents'] citizenship in name only while treating them as if they were still citizens of other states" by relegating those new residents to the legal regime in other states. William Cohen, "Discrimination Against New State Citizens: An Update," 11 *Constitutional Commentary* 73, 79 (1994).

Third, apart from the Citizenship and Privileges and Immunities Clauses of the 14th Amendment, this Court has repeatedly invoked the Equal Protection Clause to strike down classifications burdening new state citizens based on the recency of their migration to the state. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985);

Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986). These decisions sometimes invoke "strict scrutiny" and sometimes only "minimum rationality review," but a common principle animates all of these precedents: when state laws that consign new residents to a status inferior to long-time residents, there is a danger that the state is impermissibly attempting to deter non-residents from establishing a new home within the state. Such discrimination amounts to a *de facto* immigration policy, in violation of the structural principle that states may choose policies but not people.

C. THIS COURT HAS UPHELD DURATIONAL RESIDENCY REQUIREMENTS ONLY WHEN THEY SERVE THE PURPOSE OF INSURING THAT RECENT IMMIGRANTS TO A STATE ARE BONA FIDE RESIDENTS WITH AN INTENT TO ESTABLISH DOMICILE WITHIN THE STATE.

As this Court has well understood, "'appropriately defined and uniformly applied bona fide residenc[y] requirements'" are presumptively valid, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255 (1974)(quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 n.13 (1972)), whereas other durational residency requirements are not. State autonomy in a federal system requires that states not be forced to bestow the fruits of its tax effort on the nation at large.[13] Implicit in legitimate state power to treat residents and non-residents differently is some power to define residency, but in a fashion that does not make a mockery of the presumptive constitutional invalidity of length of residence distinctions. With respect to most lengthy residence distinctions, this Court has refused to accept the claim that they were an appropriate measure of bona fide residence.

The two circumstances in which this Court has upheld lengthy residency requirements — in-state tuition and divorce

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[13] *See* Varat, *supra* note 12, at 519-30.

decrees — have involved state government programs that bestow "portable" benefits on newcomers. When the beneficiaries of a state-financed program can continue to reap the benefits of the program after they leave the state, there is a special risk that transient immigrants will take the portable benefit and run: they may enter the state with no genuine domiciliary intent, intending instead to leave as soon as he or she has stayed long enough to obtain some state-created asset such as a divorce decree or college education.

For instance, the Court's summary affirmance of a one-year residency requirement for lower in-state university in *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971), might best be explained by the high likelihood that college applicants might fake their domiciliary intent, attend a state university for a few years, and then leave the state with their diploma in hand. *See Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) (a state may "establish such reasonable criteria for in-state status as to make virtually certain that students *who are not, in fact, bona fide residents of the State*, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.") (emphasis added).

This Court's decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), upholding a one-year durational residency requirement to qualify as a petitioner in a divorce action, can be explained on similar grounds, because, like college diplomas, divorce decrees have value for the immigrant even after he or she leaves the state. As the *Sosna* Court noted, the state had an interest in insuring that "those who seek a divorce from its courts *be genuinely attached to the State.*" *Id.* at 409 (emphasis added). Absent such special proof of genuine attachment, there is an obvious risk that the person seeking a decree will fake their domiciliary intent just long enough to get the decree and then leave with the state-created benefit.

Highlighting these features of *Sosna* indicates how most durational residency requirements — including the one at issue in this case — differ from the residency requirements for divorce decrees or in-state tuition at state universities that this Court has upheld. Unlike the recipient of a university diploma or divorce decree, the recipient of welfare benefits cannot continue to receive benefits from the state's expenditure of funds after he or she departs the state: as soon as the welfare beneficiary leaves, he or she is disqualified from receiving any further payments of benefits. It would, therefore, make little sense to worry that welfare beneficiaries might enter a state to receive welfare benefits without any genuine domiciliary intent to reside there indefinitely. Indeed, by invoking the fear of becoming a "welfare magnet" to justify this durational residency requirement, California appears to concede that respondents intend to reside indefinitely in California. *Green v. Anderson*, 811 F. Supp. 516, and 522 n. 14 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe sub nom. Anderson v. Green*, 513 U.S. 557 (1995). Such a fear suggests that California is worried that indigent newcomers will *stay too long,* not that such newcomers will *leave too quickly.*

II. CALIFORNIA'S DURATIONAL RESIDENCY REQUIREMENT CANNOT BE JUSTIFIED BY A GOVERNMENTAL INTEREST IN AVERTING EITHER "DISTORTION" OF INTERSTATE MIGRATION OR A "RACE TO THE BOTTOM" IN WELFARE BENEFITS.

In light of the principles discussed above, California's durational requirement residency falls squarely within the presumption against distinctions based on residency contained in Article IV's Privileges and Immunities Clause and the Fourteenth Amendment. It discriminates on its face against bona fide residents of the state based on the recency of their arrival to the state for reasons unrelated to proof of bona fide residency in the state.

The amicus brief filed by the United States urges, however, that such facial discrimination against new residents based on recency of arrival in the state can be justified by "plainly legitimate" (U.S. Amicus at 20) and, indeed, "important" (U.S. Amicus at 26-27) governmental interests aside from proof of bona fide residency. These purposes are (1) avoiding "distorted" incentives for interstate migration by benefit recipients and (2) "mitigating any tendency toward a 'race to the bottom' in . . . benefit levels (U.S. Amicus at 20). Both of these interests boil down to the same essential concern -- the concern that, absent some sort of limit on interstate migration, "each State has some incentive to set its benefit level at or below the level selected by every other State, so as to avoid attracting an influx of benefit-eligible migrants." U.S. Amicus at 20.

Amici urge this Court to reject the United States' contention that these interests suffice to justify durational residency requirements. Such a theory disregards this Court's precedents, which expressly reject this view. But, more important, the United States' position, if accepted, would come close to gutting this Court's right-to-travel jurisprudence: there simply is no coherent, judicially manageable way to cabin these rationales for discriminating against new state residents.

This Court has steadfastly rejected the notion that durational residency requirements can be justified by a desire to deter non-residents from taking advantage of state spending programs. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the appellant state governments argued that durational residency requirements "may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits." *Id.* at 631. But this Court rejected such an argument, stating that

> "a State may no more try to fence out those indigents who seek higher benefits than it may try to fence out indigents generally. Implicit in

> any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance." *Id.* at 631-32.

Likewise, this Court in *Maricopa County* rejected Maricopa County's argument that it needed to use residency requirements to "sustain the political viability of its [medical subsidy] programs." Maricopa County argued that, unless they could deter indigent persons from using the county hospital, "the threat of an influx of indigents would discourage 'the development of modern and effective (public medical) facilities.'" *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 266 (1974). But the Court reiterated its holding in *Shapiro* that neither Congress nor the states could induce higher levels of spending for indigents by discriminating against recently arrived bona fide indigent state residents, noting that such a method of encouraging higher spending on social programs is analogous to the policy of "induc[ing] wider state participation in school construction" by authorizing racial segregation in schools. *Id.*

In short, *Maricopa* and *Shapiro* squarely reject the argument proffered by the United States that Congress can encourage "full and committed state participation" in welfare programs by authorizing discrimination against newly arrived indigent immigrants. Whatever the merit of the end — increased welfare spending — neither the states nor Congress could use the unconstitutional *means* of durational residency requirements to achieve that end. None of these precedents prevents Congress from dealing with the practical "race-to-the-bottom" problem. If Congress wants to encourage states to participate in the TANF

program, then it can offer the state governments sufficient funds to cover the risk that the state's program might attract a disproportionate number of indigent persons from other states. (Per-person grants are one but not the only way to structure such a program).

The United States' suggested justifications for durational residency requirements are not simply inconsistent with this Court's precedents. They are also impossible to cabin with any judicially manageable standards: to accept the United States' reasoning is to eviscerate this Court's right-to-travel jurisprudence by opening the door to a myriad of state laws discriminating against newcomers.

It is important to see that the justifications for durational residency requirements proffered by the United States would justify a vast array of discrimination against new state residents, far beyond the context of welfare. The reason is that welfare benefits are not the only state program at risk from a "race to the bottom." Rather, such a danger arises whenever a state enacts *any* program that benefits below-median income households or workers at the expense of taxpayers and regulated industry. Any such program will tend to raise the tax or regulatory burden on the industry and other households within the jurisdiction, which in theory might induce them to exit the jurisdiction to escape these regulatory or tax burdens. Likewise, such programs may theoretically tend to attract indigent persons interested in reaping the program's benefit. The result is that the state or local government may be discouraged from enacting social welfare programs by the prospect that its tax base will erode as the cost of the program increases.[14]

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[14] *See, e.g.*, PAUL PETERSON, THE PRICE OF FEDERALISM (1995); James A. Brander, *Economic Policy Formation in a Federal State: A Game Theoretic Approach*, in INTERGOVERNMENTAL RELATIONS

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Thus, if states or Congress can justify durational residency requirements by invoking the theoretical possibility of a "race to the bottom" from unconstrained interstate migration, then the door would be opened for such requirements in a broad array of government programs. For instance, it is well-known that states' incentives to enact minimum wage legislation might be dampened by the problem of a "race to the bottom": states with a high minimum wage may tend to drive out industry while they attract workers eager to gain the benefits of the wage.[15] Therefore, under the United States' reasoning, states ought to be permitted to provide workers who migrate to a new state only the minimum wage level in their former state for one year, until they qualify for their new state's minimum wage level. The same reasoning would justify durational residency requirements in workers' compensation, disability, and unemployment insurance: this Court has itself stated that states can be discouraged from enacting generous social insurance programs by the prospect of becoming a "magnet" for poorer households that will induce the exit of their taxpaying industries. *Steward Machine v. Davis*, 301 U.S. 548, 588 (1937) ("Many held back [from enacting unemployment insurance] through alarm lest, in laying such a toll

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[14](...continued)
33, 47-54, 60- 65 (Richard Simeon ed., 1985) (arguing that interjurisdictional competition in industrial policy results in net welfare cost which may be resolved by a central government or binding code of conduct); *See* ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT 122 (1992); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 919 (1985) ("The mobility of capital and of persons may also deter state and local governments from providing adequate welfare and social services for the needy.").

[15] DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 76-77 (1991)

upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors"). The same argument obviously applies *mutatis mutandis* to state programs for affordable housing, funds for education of the socially disadvantaged, job training, community development, and a myriad of other programs that benefit below-median income households. In each case, the dynamic is the same: one can theoretically argue that states will be more willing to be generous in social spending if they can treat newly arrived residents as non-residents for one year or longer. The prescription proposed by the United States, therefore, ought to be the same as well: the states and Congress ought to have the power to deny equality of state citizenship and burden interstate travel in order to encourage states to boost their social welfare spending for oldtime residents.

In short, if this Court were to accept the justification for durational residency requirements offered by the United States, then the Court would work a sweeping change in its right-to-travel jurisprudence: it would a vast array of durational residency requirements. In Justice Cardozo's words used in an analogous context, "[t]his would be to eat up the rule under the guise of an exception " *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). This is precisely why this Court has refused to go down such a path and has consistently rejected the reasoning that the United States presents. *See Shapiro*, 394 U.S. at 633 (rejecting reasoning that would "logically permit" a vast array of discrimination against new residents).

The United States, however, argues that its proposed justifications for discrimination against new residents will not drastically disturb this Court's jurisprudence, because the United States' justification would not apply to "severe burdens" on the right to interstate migration that amount to a "penalty" on such migration. The United States distinguishes *Shapiro* from this case by noting that *Shapiro* involved a total denial of welfare benefits, whereas California's statute "only" relegates new

residents to the level of benefits offered in the migrant's old state. (Amicus at 25-26).

The difficulty with such a distinction between "severe" and "non-severe" burdens is that it is logically incoherent and judicially unmanageable. If states can legitimately exclude new residents from enjoying the benefits of the state's laws in order to encourage more generous spending on social programs, then why cannot a state impose a total exclusion from such programs? After all, indigent non-residents might be attracted by the higher welfare benefits in California, even if they have to wait for a year to get them. The United States might reply that a total exclusion would somehow be "too great" a deterrent on interstate migration. However, this Court has repeatedly stated that the actual empirical deterrent effect on migration is irrelevant in principle to the legal analysis of durational residency requirements. As this Court noted in *Maricopa*, "[a]n attempt to distinguish *Shapiro* by urging that a durational residence requirement for voter registration did not deter travel, was found to be a 'fundamental misunderstanding of the law' in [*Dunn v. Blumstein*]." *Maricopa* reiterated the holding of *Dunn* that "'*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence." *Maricopa*, 415 U.S. at 258-59 (quoting *Dunn*, at 339-40).

This refusal to base the right to interstate migration on the actual magnitude of deterrent effects makes eminent sense: reliance on speculations about the "severity" of a burden on a new resident would transform the Court's "right-to-travel" jurisprudence into an ad hoc and judicially unmanageable quagmire. All durational residency requirements, after all, will deter some interstate migration and will impose some burden on new residents. The United States can provide no principled criteria for explaining when a tolerable burden crosses some imaginary line to a "severe" burden, and no principled line looks possible. The sheer judicial unmanageability of the inquiry

proposed by the United States is a powerful reason to reject it: a nebulous "test" that rests on the "severity"of a burden undermines the predictability and judicial manageability of this Court's doctrine. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-83 (1989); *Morrison v. Olson*, 487 U.S. 654, 733-34 (1988) (Scalia. J., dissenting) ("A government of laws means a government of rules" and deploring "ad hoc approach to constitutional adjudication").

To be sure, there may be circumstances in which this Court has no choice but to balance burdens on liberty against governmental interests. *See* Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. at 1186-87 (doubting that "legal determinations that do not reflect a general rule can be entirely avoided"). In particular, when the Court enforces non-comparative rights, then the content of the right cannot be defined simply by what state law generally provides to state residents. In such cases, this Court is forced to rely on its own assessment of how broadly to enforce the citizens' liberty interest.

However, when this Court enforces rights to equal treatment, the comparative nature of the right allows the Court to avoid ad hoc inquiries into the severity of burdens: the state's own laws provide the baseline by which to measure rights of the citizens. In this case, for instance, this Court can determine the content of the right to intrastate equality simply by requiring California to provide the same treatment to new bona fide residents that it provides to long-term residents.[16] Rather than

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[16] For this reason, the amicus brief filed by the Institute for Justice is incorrect to argue that *Shapiro v. Thompson* somehow protects an "entitlement to higher welfare benefits in one's new State of residence." (Institute for Justice Amicus brief at 19). *Shapiro* entitles new residents only to *non-discriminatory* treatment: they are entitled only to whatever benefits that long-term residents receive.

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ask whether California's discrimination against new residents in welfare benefits is "severe," the Court can ask whether the residential requirement is related at all to the goal of establishing the bona fide domiciliary intent of new residents. The answer to this question is easy: as noted in Part I(C) above, there is no serious argument that welfare recipients need an extra-long period of residency to establish their domiciliary intent because they are especially likely to be transients who will soon leave the state. Therefore, under the proper and judicially manageable test of constitutionality, this residency requirement should be held invalid by this Court.

III. 42 U.S.C. SECTION 604(C) CANNOT AUTHORIZE CALIFORNIA'S DURATIONAL RESIDENCY REQUIREMENT.

Congress has enacted 42 U.S.C. § 604(c), which provides that "[a] State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." The amicus brief filed by the United States urges that this "federal authorization [for California's residency requirement] is of central importance" (U.S. Amicus at 24) and is "highly relevant to" the analysis that this Court applies in evaluating the constitutionality of section 11450.3. (U.S. Amicus at 18). Without specifying precisely how the federal statute should affect this Court's analysis, the United

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[16](...continued)
Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974) ("the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents"). If the new state generally pays lower benefits than the new resident's former state, then the new resident is entitled only to such lower benefits.

States urges that the Court apply intermediate rather than strict scrutiny to California's residency requirement because of the federal authorization.

We respectfully disagree with the United States' analysis of the relevance of 42 U.S.C. § 604(c). As the United States concedes, the rights to interstate migration and intrastate equality protected by the Fifth Amendment, the Fourteenth Amendment's Citizenship Clause, and Article IV, section 2, are personal rights that Congress itself is prohibited from abridging. (U.S. Amicus at 24). Given this concession, it is difficult to see why the existence of a federal statute authorizing state discrimination against newcomers should affect this Court's analysis of such discrimination.

This Court has recently reiterated that "'[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995). Therefore, if the Court agrees with amici that California's durational residency requirement violates the Fourteenth Amendment's equal protection clause, then it follows that Congress' "authorization" of this violation would itself be an arbitrary deprivation of liberty under the Fifth Amendment. This was the conclusion of this Court in *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969), when confronted with precisely this question of whether Congress could authorize states to violate the right to interstate migration. *Id.* at 641-42 ("Congress may not authorize the States to violate the Equal Protection Clause" because such authorization "violates the Due Process Clause of the Fifth Amendment").

Viewed in light of the 14th Amendment's text and original understanding, this holding makes perfect sense. The Citizenship Clause states that citizens of the United States "are citizens of the State wherein they reside." Unlike the other three clauses of section 1, the Citizenship Clause limits both the federal and state governments, denying Congress any power to

relegate any U.S. citizen to the status of a citizen of a state other than his or her state of residence.

The experience of the antebellum period also suggests that the framers of the 14th Amendment would not give Congress broad discretion to interfere with interstate migration. The efforts of fugitive slaves to escape to Northern states and take advantage of those states' personal liberty laws dramatically illustrated how an individual's ability to flee from an oppressive state for other states more protective of liberty could be a safeguard against tyranny.[17] But the same experience suggested that the national government could suppress the liberty-preserving tendencies of federalism if it had unlimited power to interfere with interstate migration. The federal government, after all, had enacted the Fugitive Slave Acts of 1793 and 1850. These were detested by Republicans as national efforts to extend slavery into Northern states. They were regarded by abolitionist lawyers as unconstitutional laws that exceeded Congress' delegated powers.[18] Given that the 39th Congress was crucially

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[17] For a description of these personal liberty laws and how they interfered with the efforts of Southern slaveowners to recapture runaway slaves, see THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861 (Baltimore 1974); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (Chapel Hill, N.C., 1981).

[18] JACOBUS TENBROEK, EQUAL UNDER LAW 61-63 (1965); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY, *supra* note 5 at 323-24 (describing Republicans' "pervasive fear of a nationalization of slavery"). For famous examples of abolitionist lawyers' arguments against the constitutionality of the Fugitive Slave Acts, see Salmon P. Chase's argument in *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847), reprinted in SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM 1700-1872: THE PAMPHLET

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influenced by abolitionist legal theory,[19] it seems exceedingly unlikely that the framers of the 14th Amendment meant to give Congress a blank check to interfere with individual citizens' right of interstate migration. Indeed, the framers specifically altered the 14th Amendment, transforming it from a grant of power to Congress to a self-executing declaration of individual rights, precisely because they worried that Congress could not be trusted to enforce the rights of national citizenship if Congress fell under the control of Democrats unsympathetic to the liberties of the freedmen.[20]

Admittedly, this history is suggestive rather than conclusive. However, this Court has consistently drawn a distinction between dormant commerce clause prohibitions on state governments, which Congress can freely waive, and 14th Amendment restrictions such as the right to interstate migration, which cannot be eliminated by Congress. *See Bray v. Alexandria*

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[18](...continued)
LITERATURE 436-46 (1988), in which Chase argued that Congress lacked the power to enforce the Fugitive Slave Clause of Article IV, section 2 and had no other source of power to interfere with the interstate migration of fugitive slaves. Whatever the merits of Chase's legal arguments *before* the Civil War Amendments, it is well-recognized that the framers of the 14th Amendment were heavily influenced by such abolitionist theories about the proper scope of Article IV, section 2 when they drafted the 14th Amendment. *See supra* note 6.

[19] JACOBUS TENBROEK, EQUAL UNDER LAW 234-35 (1965).

[20] *See* WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 55 (1988) (describing Representative Giles Hotchkiss' successful motion to amend 14th Amendment transforming it from grant of power to Congress to declaration of rights "that legislation cannot override").

Women's Health Clinic, 506 U.S. 263, 277 n.7 (1993) ("[dormant commerce cases] are irrelevant to the individual right of interstate travel we are here discussing. That right does not derive from the negative Commerce Clause, or else it could be eliminated by Congress"). It is one thing for Congress to block the movement of goods across state lines pursuant to its powers under the Commerce Clause. It is another thing altogether for Congress to presume to interfere with the free migration of U.S. citizens, which, as Justice Douglas noted in his concurrence in *Edwards v. California*, "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal." *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring). Whatever Congress' power to regulate the national economy, no one has ever suggested that Congress, any more than the states, can "prevent a citizen because he was poor from seeking new horizons in other States," *Edwards*, 314 U.S. at 181 (Douglas, J., concurring). To allow Congress to interfere with this liberty is to "withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity." *Id.*

Interstate mobility is not only an important individual liberty; it is also part of our system of federalism that Congress is constitutionally required to respect. As noted earlier, federalism preserves liberty because it gives each citizen the power to escape oppressive state laws by moving to a new state. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (federalism "makes government more responsive by putting States in competition for a mobile citizenry"). If Congress had some special power to relegate a citizen to the laws of a state where the citizen was not a resident, then this aspect of federalism would be critically undermined. The state laws imposed on citizens by Congress would follow them like a shadow, depriving them of the capacity to "vote with their feet" by migrating to states with less oppressive laws or social conditions. State officials might well have an incentive to

endorse this erosion of interstate mobility, because such loss of interstate mobility relieves them of the obligation to "compete for a mobile citizenry": instead, state officials could sit complacent behind immigration barriers authorized by Congress, and the liberty-preserving characteristic of federalism would be lost. But Congress cannot undermine our system of federalism in this way even with the cooperation and assent of the state governments themselves. *See New York v. United States*, 505 U.S. 144, 182 (1992) ("departure from the constitutional plan cannot be ratified by the 'consent' of state officials").

The amicus brief of the United States implies that, even if the interest in avoiding a race to the bottom would not be sufficient justification for a *state* residency requirement, the interest somehow becomes constitutionally sufficient when asserted by Congress. But this Court has held that Congress cannot re-define the contours of constitutional rights or constitutional federalism through ordinary legislation. *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157, 2164 (1997) ("Congress does not enforce a constitutional right by changing what the right is"). If the enforcement power granted Congress by Section 5 of the Fourteenth Amendment does not permit Congress substantively to expand the rights the Amendment secures, as held in *Flores*, then it surely does not permit Congress to contract those rights, including the right to fully equal citizenship in the state in which a person resides.

The legislative history of 42 U.S.C. § 604(c), however, indicates that Congress made no effort to insure that state durational residency requirements were consistent with judicially recognized constitutional liberties. Contrary to the United States' amicus brief, the Congress did not elucidate any new federal interest that is consistent with this Court's precedents. Rather, Congress simply lent its imprimatur to state interests that this Court has rightly held to be insufficient to justify durational residency requirements. The House Report on 42 U.S.C. § 604 (C) simply acknowledged the holding in *Shapiro* and then

observed that this Court "has not ruled on the question of paying lower amounts of aid for incoming residents." H.R. No. 104-651, reprinted in 1996 U.S. Code, Cong., & Admin. News 2183, 2396. The floor debate was similarly cursory. As far as amici law professors can determine, members of Congress were silent about the constitutional question in the debates over the TANF block grant program. In earlier debates over a similar provision introduced as a rider to the 1992 Omnibus Budget Act, supporters of durational residency requirements again merely noted that the proposed federal statute was different from the total denial of welfare benefits struck down by this Court in *Shapiro*, but no one bothered to explain why this distinction had any constitutional significance. *See* Proceedings and Debates of the 102d Cong., 2d Sess., Friday, April 10, 1992, 138 Cong. Rec. S5413, S5474 (Remarks by Senator D'Amato) (observing that "there is a distinction that can be made and should be made" between facts of *Shapiro* and lesser reduction of welfare benefits).[21]

Congress' perfunctory allusions to *Shapiro* notwithstanding, congressional debates over durational residency requirements indicate that Congress intended to allow the states to divide state citizens between relatively privileged oldtimers and burdened newcomers for reasons that this Court has held to be illegitimate. For instance, Senator D'Amato defended an earlier and similar authorization for durational residency requirements by arguing that "we do not want to have a situation where people deliberately come to our State to receive higher benefits. That becomes injurious to *our* State, to *our* people, and to *our* taxpayers . . . ." *Id.* (Emphasis added). But this "justification"

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[21] Moreover, some members of Congress objected to even this trivial mention of the constitutional issue, arguing that "it is going to take a lot of time for a vote on constitutionality" and that reductions in federal spending alone did not themselves raise constitutional questions. *See* Remarks of Senator Domenici, *id.* at S5474-75.

for state discrimination against newly arrived residents flies in the face of equal and state national citizenship guaranteed by the Fourteenth Amendment, under which "[t]he State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of [the recency of] their arrival." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985).

In sum, Congress did not set forth some new and distinctive federal interest that would justify durational residency requirements consistent with this Court's precedents. Rather, Congress simply gave blanket authorization to the states to do precisely what this Court has prohibited — assign each citizen to his or her current state of residence and then authorize other states to treat those citizens as non-residents even after they migrated to a new state to establish a home for the purpose of deterring such migration. *City of Boerne v. Flores* (not to mention the very idea of a written and permanent Constitution) prohibits Congress from so casually altering the substantive scope of constitutional rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted.

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